

Southwestern Bell Telephone

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Federal Communications Commission
Office of the Secretary

May 8, 1992

Richard C. Hartgrove
General Attorney

Mr. William A. Blase
Director-Federal Regulatory
Southwestern Bell Corporation
1667 K Street, N.W., Suite 1000
Washington, D.C. 20006

Dear Bill:

Re: Reply of Southwestern Bell Telephone Company,
CC Docket No. 92-26

Enclosed please find an original and five (5) copies of the above-referenced pleading to be filed with the Secretary of the Commission on Monday, May 11, 1992. Also enclosed is a copy of the pleading to be filed-stamped and returned to me.

Additional copies of the pleading are attached to be used as the courtesy copies and one is included for your files.

Please call to confirm that the pleading has been filed. Thank you for your assistance.

Very truly yours,

Richard C. Hartgrove

Enclosure

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MAY 11 1992

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Amendment of Rules Governing)
Procedures to Be Followed) CC Docket 92-26
When Formal Complaints are)
Filed Against Common Carriers)

REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company (SWBT) submits its Reply to the Comments filed in this Docket. SWBT supports the streamlining of the formal complaint process and agrees with certain suggestions of the Commentors. SWBT does not agree, however, with suggestions which ignore the most obvious cause of delay in these proceedings--the failure to issue prompt rulings after cases are at issue.

I. RELEVANCY OBJECTIONS

Some commentors support the proposed elimination of the relevancy objection to discovery requests.¹ Continental Mobile Telephone Company suggests that "defendants who are found liable should not be permitted to raise objections such as relevancy and scope."² Other commentors have pointed out that removal of the relevancy objection to discovery requests will encourage discovery of unprecedented breadth.³ SWBT agrees. Complainants, not

¹Comments of Continental Mobile Telephone Company, p. 3 ff.

²Id., p. 4.

³See, e.g., Comments of The GTE Telephone Companies, p. 3.

hampered by a relevancy requirement, would be free to inquire into all aspects of a defendant's business. Defendants would likewise be free to engage in massive pointless discovery as a means of delay. SWBT believes that elimination of the relevancy requirement, rather than shortening discovery, would instead make discovery more contentious and protracted, because both complainants and defendants would be forced into the judicial system to protect themselves against requests for information having nothing to do with the complaint.⁴

II. MOTIONS FOR SUMMARY JUDGMENT

SWBT agrees with MCI that the Commission's proposal to require summary judgment motions to be filed contemporaneously with answers is unworkable.⁵ If the proposal were adopted, all defendants would routinely file motions for summary judgment with their answers. An even more telling criticism is that motions for summary judgment presume discovery of relevant facts. Consequently, in the judicial forum, such motions are filed at the close of discovery, not before it has started.

A motion for summary judgment, if granted, precludes an evidentiary hearing. Such a motion therefore is appropriate only if the parties are allowed an evidentiary hearing. In the current

⁴For these reasons, SWBT cannot support the proposal to make requests for production of documents self-executing. If a party is to be allowed to request any documents at all, no matter how irrelevant to the complaint, no matter how confidential or otherwise business-sensitive, then opposing parties will not produce documents willingly.

⁵Comments of MCI Telecommunications Corporation, pp. 8-10.

formal complaint process, however, evidentiary hearings are, for all practical purposes, not allowed. The current formal complaint procedure is, in effect, a *de facto* summary judgment procedure. If the Commission intends to allow the filing of motions for summary judgment, then the Commission will have to provide the right to evidentiary hearings.⁶

III. ORAL ORDERS

Several commentators have opposed the suggestion that the Commission Staff issue oral rulings on discovery disputes.⁷ SWBT, on the other hand, suggests that the Staff issue oral rulings not only on discovery disputes but also on the merits of complaints. The general objection to oral rulings is that memories are weak and temptations for abuse are strong. This is why SWBT suggests that the Commission adopt the procedure employed in many state courts--that an oral ruling does not become effective until it is reduced to writing by the prevailing party and agreed to by all other parties. If parties cannot agree on language in the order, parties can return to the Commission. Obstreperous attorneys, of course, can refuse to agree to any proposed language. If the Staff makes clear that such behavior will not be tolerated, and if the Rules are amended to provide for Rule 11 type sanctions⁸ for such behavior, agreements would be reached. SWBT believes that this

⁶See, Comments of U S West Communications, Inc., pp. 7-8.

⁷See, e.g., Comments of U S West Communications, Inc. p. 4; Comments of Bell Atlantic, p. 5; Comments of BellSouth Corporation, pp. 7-8.

⁸See, Comments of United Video, Inc., pp. 16-18.

reform, if implemented, would do more than all other suggested reforms together to break the formal complaint jam.

IV. FEES

Williams Telecommunications Group, Inc. (WilTel) has proposed that the prevailing party in a formal complaint proceeding be entitled to recover its attorneys' fees, basing the request upon Section 206 of the Communications Act, which according to WilTel "expressly gives federal courts authority to award attorneys' fees to persons damaged by a common carrier's violations of the Communications Act."⁹ Apart from WilTel's apparent view that formal complaint proceedings inure to the benefit only of complainants, such a proposal would be impossible to implement fairly, because of the difficulty of defining "prevailing party." Typically, in a federal or state court action, a party recovering damages in an amount less than prayed for, or less than shown by its proof, is not considered to be "prevailing." Also, in cases in which multiple relief is sought, or in cases in which counterclaims are filed, both parties can be "prevailing" on separate issues and claims. Since the Commission refuses to allow common carriers to file counterclaims for unpaid charges,¹⁰ and since the Commission is proposing to decide the issue of liability separate and apart from the issue of damages, defendants, under WilTel's proposal, would be denied the right to recover fees which are normally

⁹Comments of Williams Telecommunications Group, Inc., pp. 4-5.

¹⁰See, e.g., *Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone Company of Missouri, Inc.*, 4 FCC Rcd 8338 (1989).

recoverable in judicial actions. SWBT therefore does not support Wiltel's proposal.

United Video has suggested that "the losing party on a motion to compel should pay the costs and reasonable attorney fees of the prevailing party in bringing or responding to the motion."¹¹ Federal Rule of Civil Procedure 37(a)(4) requires the losing party on a motion to compel to pay fees and costs related to the motion unless "the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." SWBT does not oppose any rule modeled after 37(a)(4). To require the losing party on a motion to compel to pay fees and costs *in all instances*, however, would unfairly punish parties making good faith objections. United Video's proposal, combined with the Commission's proposal to eliminate relevancy as an objection to discovery requests, would not only encourage complainants to search defendants' records at will, thereby increasing both the expense and delay of discovery, it would encourage defendants to take the same approach--as a matter of self-defense. These proposals would, in SWBT's view, transform discovery into the equivalent of the siege of Vicksburg.

¹¹Comments of United Video, Inc., p. 15.

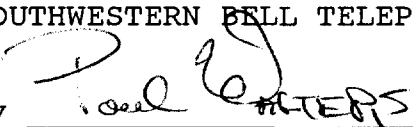
V. CONCLUSION

SWBT supports certain suggestions to streamline the formal complaint process. However, until orders can be issued rapidly once cases are at issue, the jam will remain unbroken.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By



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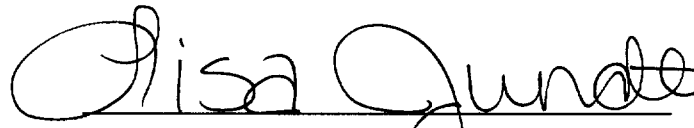
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May 11, 1992

CERTIFICATE OF SERVICE

I, Lisa Jundt, hereby certify that the foregoing "Reply of Southwestern Bell Telephone Company" in Docket # 92-26 has been served this 11th day of May to the Parties of Record.



Lisa Jundt

May 11, 1992

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